No. 76-1645

# In the Supreme Court of the United States

OCTOBER TERM, 1977

GENERAL DYNAMICS CORPORATION, PETITIONER

*v.*

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
*Solicitor General,*

M. CARR FERGUSON,
*Assistant Attorney General,*

RICHARD FARBER,
*Attorney,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 76-1645

GENERAL DYNAMICS CORPORATION, PETITIONER

*v.*

BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AT.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

---

This brief is submitted in response to the Court's request for the views of the United States with respect to this case.

## QUESTION PRESENTED

The State of Texas has a franchise tax on the privilege of doing business in the State measured by a portion of the capital of each corporation conducting business within its borders. The portion of capital allocable to Texas is measured by a formula multiplying total capital by the fraction formed by gross receipts from Texas over total gross receipts.

The question presented is whether the inclusion in Texas gross receipts of gross receipts from business conducted in a federal enclave within Texas violates Article I, Section 8, Clause 17 of the Constitution, which

provides that "Congress shall have Power * * * [t]o exercise exclusive legislation * * * " over areas ceded to the federal government by particular states.

### CONSTITUTION PROVISION AND STATUTES INVOLVED

Article I, Section 8, Clause 17 of the Constitution and the pertinent parts of the Buck Act (4 U.S.C. 110) and the Texas franchise tax, Articles 12.01 and 12.02, Texas Taxation—General Statutes Annotated (1969), are set forth at pp. 3-5 of the petition.

### STATEMENT

Petitioner is a corporation engaged primarily in the manufacture and sale of defense equipment and supplies. During 1968-1971, the taxable years at issue, it conducted business at various locations within the State of Texas, including a 428-acre federal enclave known as Air Force Plant No. 4 (Pet. Ex. B 23-24).

Texas has a franchise tax on the privilege of doing business in the State measured by the capital of every domestic and foreign corporation conducting business within its borders. In order to measure the portion of capital allocable to Texas, Article 12.02(1)(a) of the franchise tax statute provides a formula, pursuant to which total capital is multiplied by the fraction formed by gross receipts from Texas business over total gross receipts (see Pet. 5).

Petitioner brought this suit in the district court of Travis County, Texas, to recover more than $2 million in franchise taxes on the ground that the gross receipts from the business conducted within the federal enclave could not constitutionally be included in the franchise tax allocation formula. The district court upheld petitioner's claim and awarded judgment of $2,008,757.11 (Pet. Ex. A 21-22; Pet. Ex. B 23-24).



The Texas Court of Civil Appeals reversed (Pet. Ex. B 23-28). It held that the Texas franchise tax was an "income tax" within the meaning of the Buck Act, 4 U.S.C. 110(c). It therefore concluded that Congress had approved the inclusion of the gross receipts from business operations within a federal enclave in a state tax allocation formula (Pet. Ex. B 26-27).

In a divided decision, the Texas Supreme Court affirmed (Pet. Ex. C 29-36; Pet. Ex. D 37-38; Pet. Ex. E 39-40; Pet. Ex. F 41-42). The majority agreed with the Court of Civil Appeals that the franchise tax formula properly took petitioner's gross receipts from the federal enclave into account because the tax was an "income tax" as defined by the Buck Act. In a concurring opinion, Associate Justice Reavley concluded that the tax was valid because there was no constitutional prohibition against the inclusion of petitioner's gross receipts from its business within the federal enclave. However, he disagreed with the majority's determination that the franchise tax qualified as an income tax under the Buck Act (Pet. Ex. D 37-38). Chief Justice Greenhill dissented on the ground that the franchise tax was not an income tax under the Buck Act and that the inclusion of the gross receipts from the federal enclave was barred by Article I, Section 8, Clause 17 of the Constitution (Pet. Exs. E and F 39-42).

### ARGUMENT

Article 12.01 of the Texas Franchise Tax Statute subjects every domestic and foreign corporation doing business in Texas to an annual franchise tax measured by the portion of its "taxable capital" that is allocable to Texas. Pursuant to Article 12.02, that portion is computed by multiplying the corporation's total capital by a fraction, the numerator of which is the corporation's gross

receipts from business done in Texas and the denominator of which is the corporation's total gross receipts.[1]

Petitioner argues (Pet. 15-19) that Texas could not constitutionally regard the gross receipts from business done within the federal enclave as gross receipts from Texas business for purposes of the franchise tax allocation formula because that enclave was not part of Texas. In petitioner's view, inclusion of its gross receipts from its enclave operations in the allocation formula is tantamount to a state tax upon petitioner's activities within the enclave and is therefore contrary to the exclusive federal jurisdiction in that area conferred by Article I, Section 8, Clause 17 of the Constitution.[2] See *Surplus Trading Co.* v. *Cook*, 281 U.S. 647; *Standard Oil Co.* v. *California*, 291 U.S. 242. Petitioner further argues (Pet. 16-17) that the Texas franchise tax cannot be characterized as an "income tax" within the meaning of the consent provisions of the Buck Act, 4 U.S.C. 110(c), and that the decision below erred in so holding.

---

[1]Article 12.01(a)(1) imposes the tax on "taxable capital," which it defines as the sum of stated capital, surplus and undivided profits. During the years in issue, the prescribed rate was $2.75 per $1,000 of taxable capital. The statute also provides an alternative method of computing the franchise tax based on the assessed value of the corporation's property in the state. However, the alternative computation is applicable only where it yields a higher tax, which was not the case here.

[2]Article I, Section 8, Clause 17 provides:

> The Congress shall have Power * * * [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts Magazines, Arsenals, dock-Yards and other needful buildings; * * *



1. We agree with petitioner that the Texas franchise tax is not an "income tax" within the meaning of the Buck Act, 4 U.S.C. 110(c). As the Court most recently explained in *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 611, the Buck Act was enacted in 1940 to bar the federal government from asserting tax immunity on the ground that "the Federal Government has exclusive jurisdiction over the area where the transaction occurred." S. Rep. No. 1625, 76th Cong., 3d Sess. 2 (1940). Section 106(a) of the Buck Act provides that "[n]o person shall be relieved from liability for any income tax levied by any State * * * by reason of his residing within a Federal area or receiving income from transactions occurring * * * in such area * * * " (4 U.S.C. 106(a)). Section 110(c) defines the term "income tax" as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

The Texas franchise tax is not an "income tax" within the meaning of the Buck Act. While the definition of "income tax" in Section 110(c) is broadly cast, it is not so elastic that it can be stretched to cover every conceivable tax. See, *e.g.*, *Mississippi River Fuel Corp.* v. *Cocreham*, 382 F. 2d 929 (C.A. 5), certiorari denied *sub nom. Mouton* v. *Mississippi River Fuel Corp.*, 390 U.S. 1014; *Johnson* v. *City and County of Denver*, 186 Colo. 398, 527 P. 2d 883.

Here, as this Court long ago recognized in *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, the Texas corporate franchise tax is based on and measured by the amount of the corporation's capital and not its income or gross receipts. Pursuant to Article 12.01(a), the measure of the tax is a flat fee for each $1,000 of taxable capital, *i.e.*, capital allocable to Texas. Although the corporation's gross receipts are used to determine what percentage of its

total capital is allocable to its Texas business and thus taxable under the statute, that fact does not make the tax one that is measured by gross receipts. Indeed, an increase or decrease in a corporation's total gross receipts will produce no corresponding increase or decrease in its franchise tax liability as long as the proportion of the total receipts that is attributable to its receipts from business done in Texas remains constant. Thus, the majority erred in holding that the franchise tax was an "income tax" under the Buck Act.

2. The statutory allocation formula nevertheless may constitutionally include the gross receipts from petitioner's operations within the federal enclave.

a. It is undisputed that Air Force Plant No. 4 is subject to the exclusive jurisdiction of the United States. See *Board of Equalization* v. *General Dynamics Corp.*, 344 S.W.2d 489 (Tex. Civ. App.). Since Force Plant No. 4 is an exclusive jurisdiction federal enclave, it is clear that Texas could not impose a tax on property located or business conducted within that enclave. *Surplus Trading Co.*, v. *Cook, supra; Standard Oil Co.* v. *California, supra.* Nor can a state regulate transactions or activities that occur within areas over which the federal government exercises exclusive jurisdiction unless Congress specifically authorizes such state regulation. See, *e.g.*, *Paul* v. *United States*, 371 U.S. 245, 263-270.

But the area comprising the federal enclave did not cease to be a part of the State of Texas upon its cession to the United States. In *Howard* v. *Commissioner*, 344 U.S. 624, the City of Louisville, Kentucky, annexed certain territory over which the United States previously had acquired exclusive jurisdiction through condemnation



proceedings undertaken with the consent of the Kentucky legislature. The annexation was subsequently challenged on the ground that the area ceased to be a part of Kentucky when the United States acquired exclusive jurisdiction over it. The Court, however, rejected that contention, stating (*id.* at 626-627):

> When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be part of Kentucky. • • • The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.

Under *Howard*, it would appear that there is no bar against considering petitioner's gross receipts from its enclave operations to be part of its gross receipts from Texas business.

b. Thus, the only remaining question is whether the inclusion in the allocation formula of petitioner's gross receipts from the enclave violates Article I, Section 8, Clause 17 of the Constitution.

While this Court has never squarely ruled on the issue, there are analogous decisions that appear to support inclusion of the enclave gross receipts in the franchise tax formula.

In an analogous context, the Court in *Werner Co.* v. *Director of Taxation*, 350 U.S. 492, upheld a state franchise tax the measure of which included tax-exempt federal obligations. The Court observed that it had "consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property,

even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property" (350 U.S. at 494). See also *Flint* v. *Stone Tracy Co.*, 220 U.S. 107; *Educational Films Corp.* v. *Ward*, 282 U.S. 379; *Pacific Co.* v. *Johnson*, 285 U.S. 480.

If, as the Court held in *Werner Co.*, *supra*, a state may impose a corporate franchise tax measured by exempt income or property, one could argue that Texas may indirectly take gross receipts from the federal enclave into account in an apportionment formula to determine the amount of corporate capital allocable to the state.

The concurring opinion of Associate Justice Reavley relied upon these authorities. In his view (Pet. Ex. D 37-38), while Texas could not impose a tax on the privilege of doing business within the enclave, it could properly tax the privilege of doing business throughout the State. As a means of allocating capital to Texas, the State could take into account total Texas sales, including sales within the enclave.

Finally, *Harvester Co.* v. *Evatt*, 329 U.S. 416, offers another useful analogy. There, in upholding an Ohio franchise tax that took interstate sales into account in computing the Ohio business factor in an apportionment formula, the Court observed that "[a] state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in relation to the intrastate privilege" (329 U.S. at 423).

c. At all events, the decision below is the first appellate ruling on the question whether gross receipts from a business conducted within a federal enclave may be included in an allocation formula of a state tax not covered by the Buck Act. Since the only arguably correct basis for the decision below was the concurring opinion of



a single justice of the Texas Supreme Court on a ground that was not argued by the State, we believe that it would be appropriate for other appellate courts to consider more fully the question prior to plenary review by this Court. There is accordingly no present need for the Court to rule on the issue.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

M. CARR FERGUSON,
*Assistant Attorney General.*

RICHARD FARBER,
*Attorney.*

DECEMBER 1977.

DOJ-1977-12